Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 80-689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, *et al.*,
Petitioners,

v.

CLARK VINCENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Is it a violation of the establishment clause of the First Amendment to the United States Constitution to allow a recognized student group to hold regular reoccurring religious worship services or to have religious teaching sessions in buildings of or on the grounds of a tax-supported public institution of higher education?

2. Does the free exercise clause of the First Amendment to the United States Constitution or the freedom of speech clause of the First Amendment to the United States Constitution take precedence over the establishment clause of the First Amendment to the United States Constitution?

3. Does the mandate of the state constitution of the State of Missouri requiring strict separation of church and state when it comes to the use of the facilities of a tax-supported public institution of higher education for regular worship services or religious teaching by a recognized student group, provide a sufficiently compelling interest to justify an interference with or infringement upon the free exercise rights under the First Amendment to the United States Constitution of the students?

4. Is the campus, including buildings, sidewalks and grounds, of a tax-supported public institution of higher education, a "public place" or "open forum" similar to public parklands, and, if so, does that fact require the tax-supported public institution of higher education to make its facilities available for the regular religious worship services of or religious teaching by a recognized student group?

PARTIES TO THE PROCEEDING IN THE EIGHTH CIRCUIT

Clark Vincent and Jonathan Williams were the plaintiff-appellants to the United States Court of Appeals for the Eighth Circuit.

Gary Widmar, The Board of Curators of the University of Missouri, Barbara Berkmeyer, Daniel L. Brenner, Robert A. Dempster, William T. Doak, C. R. Johnston, Marian Oldham, Wallace R. Stacey, Rex Z. Williams and Van O. Williams were the defendant-appellees in the United States Court of Appeals for the Eighth Circuit. (Mrs. Berkmeyer and Mr. Van O. Williams have been replaced as members of the Board of Curators by Mr. David Lewis and Mr. William Cocos).

Bible Study, a student organization at the University of Missouri-St. Louis; the Christian Legal Society of the University of Missouri at Kansas City; Cornerstone, a student organization at the University of Missouri-Kansas City; the International Society for Krishna Consciousness; and the Holy Spirit Association for the Unification of World Christianity filed Brief Amici Curiae with the Eighth Circuit Court of Appeals.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 635 F.2d 1310 (8th Cir. 1980) and is set forth in the Appendix to Petitioners' Petition for a Writ of Certiorari at A-1. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing or hearing by the Court en banc, including the dissent of Judges Bright and McMillian, entered on the 19th day of September, 1980, is set out in the Appendix to Petitioners' Petition for a Writ of Certiorari at A-21. The order staying the mandate of the United States Court of Appeals for the Eighth Circuit, entered on the 30th day of September, 1980, is set out in the Appendix to Petitioners' Petition for Writ of Certiorari at A-25. The findings of the United States District Court for the

Western District of Missouri is reported at 480 F. Supp. 907 (W.D. Mo. 1979) and is set out in the Appendix to Petitioners' Petition for Writ of Certiorari at A-26.

JURISDICTION

Respondents initiated the case at bar alleging jurisdiction under 42 U.S.C. 1983, 28 U.S.C. 2201 and 28 U.S.C. 1343(3). The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 4, 1980. The petition for rehearing or hearing en banc was filed on August 13, 1980 and denied on September 19, 1980. The order staying the mandate was issued by the United States Court of Appeals for the Eighth Circuit on September 30, 1980. Petitioners filed a Petition for Writ of Certiorari with the Supreme Court on October 27, 1980 and the Supreme Court granted the requested Writ of Certiorari on February 23, 1981. The jurisdiction of this honorable court rests on 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States Constitution. The First Amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case also involves the following provisions of the Constitution of the State of Missouri:

> That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or sup-

port any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same. Article I, Section 6, Constitution of the State of Missouri, 1945.

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship. Article I, Section 7, Constitution of the State of Missouri, 1945.

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever. Article IX, Section 8, Constitution of the State of Missouri, 1945.

The following regulations from the Collected Rules and Regulations of the University of Missouri are also involved in this case:

No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. Student congregations of local churches or of

recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106. Section 4.0314.0107 of the Collected Rules and Regulations of the University of Missouri.

Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group. Section 4.0314.0108 of the Collected Rules and Regulations of the University of Missouri.

STATEMENT OF THE CASE

This case was initiated on October 13, 1977, when twelve students of the University of Missouri-Kansas City filed a complaint in the United States District Court for the Western District of Missouri, Western Division. (J. A. 4).The students subsequently sought permission to file an amended complaint and did so on July 18, 1978. The students sought injunctive relief and a declaratory judgment that certain regulations of the University of Missouri, which dealt with use of University

buildings or grounds for religious worship or religious teaching, were unconstitutional and therefore void. The students sought enforcement of an alleged right to use University facilities as a place in which to hold meetings for the religious purposes of the student group to which they belonged (J.A.48, para. 4) and claimed that the University's refusal to allow such usage denied certain rights guaranteed them by the Constitution and laws of the United States. (J.A. 49-52).

Clark Vincent and Jonathan Williams (hereinafter referred to as "Respondents") were among the twelve students who initiated the action on October 13, 1977 (J.A. 4) and they were involved in cornerstone and participated in Cornerstone activities. (J.A. 26, Stipulation[1] No. 2). Cornerstone was and is an officially recognized student organization on the campus of the University of Missouri-Kansas City, which is a part of the University of Missouri system. (J.A 26, Stip. No. 1).

The University of Missouri is a constitutionally governed public corporation of the State of Missouri and operates other university campuses in Columbia, Missouri; Rolla, Missouri; and St. Louis, Missouri. The University is governed by the Board of Curators, an official nine-person body established by the Constitution of the State of Missouri for the government of the University and its affairs. (J.A. 26, Stip. No. 1).

The avowed purpose of Cornerstone is to promote a knowledge and awareness of Jesus Christ on the campus, and to encourage one another in the faith and to grow in the grace and knowledge of the Lord Jesus Christ. (J.A. 17, para. 5, Chess Affidavit). The members of Cornerstone are concerned with the practical aspects of how Christianity and the Bible relate to every aspect of their lives. (J.A. 17, para. 4, Chess Affidavit).

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[1] The facts of the case were stipulated to by the parties in documents filed with the trial court entitled "Stipulation of Fact" (J.A. 26) and "Supplemental Stipulation of Fact" (J.A. 37).

Each student at the University of Missouri-Kansas City pays a "Center Activities-Athletic Fee," the proceeds of which go, in part, to fund the operation of the student center (J.A. 26, Stip. No. 4) and for physical facility development (J.A. 37-38, Stip. No. 2 and 5).

One of the benefits afforded recognized student organizations at the University of Missouri-Kansas City is the privilege of using the student center (referred to at many schools as a student union) and certain other designated facilities of the University as a place in which to meet. (J.A. 26, Stip. No. 3). Although various religious groups, including Cornerstone, have been permitted to meet in the facilities of the University in the past, neither the Chancellor nor the Dean of Students of the University of Missouri-Kansas City have ever authorized a student organization to utilize a University facility for a meeting where they had full knowledge that the purposes of the meeting included religious worship or religious teaching. (J.A. 27, Stip. No. 9).

In early January, 1977, pursuant to established University procedures, Cornerstone sought permission to use Rooms 103 and 113 of Haag Hall Annex for two and one-half hours, from 7:00-9:30 p.m., on every Saturday night, from January 15, 1977 through May of 1977. (J.A. 27, Stip. No. 6). University oficials sought clarification as to the activities to be conducted at the proposed meetings and were advised that a typical Cornerstone meeting in University facilities usually included the following:

1. The offering of prayer;

2. The singing of hymns in praise and thanksgiving;

3. The public reading of scripture;

4. The sharing of personal views and experiences (in relation to God) by various persons;

5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and

6. An invitation to the interested to meet for a personal discussion.

The University was also advised by Cornerstone's attorney that worship was an important part of the general atmosphere of the meetings and that there was no doubt that the "undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting Jesus Christ both for salvation and for the power to live an abundant Christian life on earth." (J.A. 27, 33-35, Stip. No. 7, Exhibit C). These facts were later confirmed by the statements of one of the students who indicated that the intended program for the proposed Saturday night meetings consisted of Bible study and teaching, prayer, informal sharing, and singing and that the purpose of the group was "to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ and the Bible." (J.A. 18, Stip. No. 11, para. 8, Chess Affidavit).

Cornerstone's application for use of rooms in Haag Hall Annex[2] was rejected on or about February 4, 1977, because it was concluded that the conduct of the proposed meetings would be in violation of Sections 4.0314.0107 and 4.0314.0108 of the Collected Rules and Regulations of the University of Missouri (J.A. 27, Stip. No. 7) which have been in effect since sometime in 1972. (J.A. 26, Stip. No. 5).

The matter was submitted to Judge William R. Collinson on crossmotions for summary judgment (J.A. 36) and on December 11, 1979, Judge Collinson denied the Motion for Summary Judgment of the students and granted the Motion for Summary Judgment of Defendants Gary Widmar, the Universi-

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[2] While Cornerstone has not held group Bible studies on the University lawn (J.A. 27, Stip. No. 8), there was no evidence that Cornerstone had ever sought to do so in accordance with established University procedures (J.A. 20-22, Williams Affidavit).

ty of Missouri, and the individual members of University's governing board (hereinafter collectively referred to as "Petitioners"), thereby upholding Section 4.0314.0107 and Section 4.0314.0108 of the regulations of the University of Missouri. The trial court found that the sole university practice challenged was the University's refusal to permit the students to conduct regular religious services in university-owned buildings and that this ban on religious services was required by the Establishment Clause of the United States Constitution. Judge Collinson also found that there was no interference with the students' rights of freedom of religion; that there was no interference with their freedom of speech; that there was no denial of the students' right to equal protection of the laws; and that the University's challenged regulations were not vague and overbroad. (Opinion at pages A-26 to A-50 of Petitioners' Petition for Writ of Certiorari).

Respondents subsequently filed their timely appeal of the District Court judgment with the Eighth Circuit Court of Appeals. By opinion dated August 4, 1980, the Eighth Circuit Court of Appeals reversed the judgment of the trial Court and held that University regulation Section 4.0314.0107 was not required by the establishment clause of the First Amendment and was therefore invalid because of the burden it placed upon the rights guaranteed to the students by the First and Fourteenth Amendments of the federal Constitution. (Opinion at pages A-1 and A-20 of Petitioners' Petition for Writ of Certiorari).

Petitioners' request for a rehearing or hearing en banc was denied by the United States Court of Appeals for the Eighth Circuit on September 19, 1980, with a written dissent being made a part of that order. (Order and Opinion at pages A-21 and A-24 of Petitioners' Petition for Writ of Certiorari).

This honorable Court granted the Writ of Certiorari as requested by Petitioners on February 23, 1981.

Cornerstone remains an active officially recognized student organization of the University of Missouri-Kansas City (J.A. 16-17, para. 3, Chess Affidavit) and the members thereof continue to practice their beliefs (J.A. 17, para. 4, Chess Affidavit). Cornerstone was not permitted to hold meetings of the type described in their January, 1977, application on the campus (J.A. 26, Stip. No. 8) until September 3, 1980, when the University's governing board temporarily suspended Section 4.0314.0107 until final resolution of this litigation, said action being taken under threats by Cornerstone and others of additional legal actions. Until September 3, 1980, members of Cornerstone continued to meet off of the campus. (J.A. 18-20, para. 11, Chess Affidavit).

SUMMARY OF ARGUMENT

Section I

In this initial part of their argument, Petitioners address the question of whether or not the Establishment Clause of the First Amendment prohibits the use of University facilities for regular religious worship services or regular religious teaching sessions by an organized group of university students.

Using various methods of analysis previously suggested by this Court, Petitioners argue that such usage, if permitted, would go far beyond "accommodation" and would, instead, serve to advance the religious efforts of the students by providing them with financial assistance from public tax dollars and by providing them with the benefit of symbolic approval of their efforts by the State of Missouri.

Petitioners contend that while a regulation permitting such activity on the university campus would indeed be unconstitutional under the Establishment clause, a regulation prohibiting all such religious activity would not be under past guidelines provided by the Supreme Court.

Section II

Petitioners address the relationships of the various provisions of the First Amendment in Section II of their argument. Initially questioned is the usage of the term "religious speech" by the Eighth Circuit. Petitioners attempt to point out why such phraseology is not an appropriate method of justifying an infringement of the Establishment Clause of the magnitude sought in the case at bar.

In Section IIA, Petitioners discuss the purposes of the two-part religion clause of the First Amendment and argue that these two provisions were intended to work *together* to assure religious freedom and liberty and that to give the free exercise provision precedence over the establishment provision would defeat this historic intent.

In Section IIB, Petitioners argue that while there is perhaps room for the argument that freedom of speech and freedom of assembly are preferred freedoms, they were intended to protect completely different interests than the two-part religion clause. Thus, Petitioners submit that the freedom of speech and freedom of assembly provisions should not be considered to take precedence over the religion clause and thus be used as an easy, convenient means of interfering with the intent of the two-part religion clause.

Section III

In Section III of their argument, Petitioners first submit to the Court that there has been no infringement whatsoever of the free exercise rights of the student Respondents. Then, assuming arguendo that some minimal infringement could be found, Petitioners proceed to argue that the State of Missouri's chosen interest in maintaining a strict separation of church and state provides a compelling state interest sufficient to justify any such infringement.

Petitioners go into an extensive review of the history of Missouri's constitutional provisions which relate to separation of church and state in Section IIIB. They also set forth therein numerous decisions of the Missouri Supreme Court which verify Missouri's interest and which indicate that Missouri's requirement of separation is even more strict than that contained in the First Amendment.

Section IV

In the final part of their argument, Petitioners initially address whether or not the campus of a publicly funded university is a "public forum" similar to city streets and sidewalks and public parks. In Section IVA, Petitioners argue that the campus of a state university is dedicated to *secular* education. It should therefor be contrasted with other areas that have been considered to be "public forums" and Petitioners argue that this dedication to secular education should limit and restrict access to the campus, especially with regard to religious purposes.

Section IVB pursues this point and argues that even should the buildings and the lawn or open areas of the campus be considered to be "public forums," their usage for actual religious worship services and/or religious teaching sessions as sought by the Respondents in this case would not be permissible under the establishment clause.

ARGUMENT

I. IT WOULD BE A VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TO ALLOW A RECOGNIZED STUDENT GROUP TO HOLD REGULAR REOCCURRING RELIGIOUS WORSHIP SERVICES OR TO HAVE RELIGIOUS TEACHING SESSIONS IN BUILDINGS OF OR ON THE GROUNDS OF A TAX-SUPPORTED PUBLIC INSTITUTION OF HIGHER EDUCATION.

The United States Court of Appeals for the Eighth Circuit determined that Petitioners denied a recognized student group of the University of Missouri-Kansas City access to University facilities based on Petitioners' ". . .conclusion that the group's meetings include either religious worship or religious teaching." *Chess* v. *Widmar,* 635 F.2d 1310, 1320 (8th Cr. 1980). This is a mistatement. Your Petitioners would submit that, in fact, there can be *no* question that the meetings of Cornerstone included and/or were held for purposes of religious worship, religious teaching and religious evangelism. As stated by Judge Collinson in his opinion below:

> "In this case, it is uncontradicted that plaintiffs seek to use state-owned buildings on a regular basis for the conduct of their religious worship services." *Chess* v. *Widmar,* 480 F. Supp. 907, 915 (W.D. Mo. 1979), rev'd 635 F. 2d 1310 (8th Cir. 1980).

This fact has been candidly admitted by the students. (J.A. 18, 33-35). See also *Chess, supra,* 480 F. Supp. at 920. Petitioners would submit that reading from and commentary on the Holy Bible,[3] the offering of prayer,[4] the sharing of personal views and

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[3] See *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 224, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844 (1963).

[4] See *Engel* v. *Vitale,* 370 U.S. 421, 424-425, 82 S. Ct. 1261, 1264, 8 L. Ed. 2d 601 (1962), *Hall* v. *Bradshaw,* 630 F. 2d 1018, 1020, 1021 (4th Cir. 1980), cert. den., Case No. 80-746 on 3-3-81 (49 L.W. 3637), and *Stein* v. *Oshinsky,* 348 F.2d 999 (2d Cir 1965), cert. den. 382 U.S. 957, 86 S. Ct. 435, 15 L. Ed. 2d 361 (1965).

experiences in relation to God, and the singing of hymns are extremely religious activities and indeed can be considered integral parts of religious worship. The denial in this case was actually based on Petitioners' conclusion that permitting such meetings by Cornerstone on the premises of a publicly funded and tax-supported institution of higher education would violate and contravene the mandates of the First Amendment to the United States Constitution and several provisions of the Constitution of the State of Missouri. Petitioners maintain that these constitutional prohibitions are *absolute*! In so holding with regard to the First Amendment, this Court has stated:

> "While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as a part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public. . .colleges which 'aid or oppose' any religion." *Epperson* v. *Arkansas,* 393 U.S. 97, 106, 89 S. Ct. 266, 271, 21 L. Ed. 2d 228 (1968).

Petitioners believe that the use of facilities sought by Respondents in this case would aid and advance religion, and would thus be in violation of the First Amendment of the United States Constitution. Petitioners submit that the usage sought by Respondents falls within this Court's holding in *Hunt* v. *McNair,* 413 U.S. 734, 93 S. Ct. 2868, 27 L. Ed. 2d 923 (1973) that aid:

> "...normally may be thought to have a primary effect of advancing religion...when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt, supra,* 413 U.S. at 743, 93 S. Ct. at 2874.

A logical starting place would seem to be Justice Black's oft-quoted explanation of what the "establishment of religion" clause of the First Amendment means. In *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 67 S. Ct. 504, 88 L. Ed. 1148 (1947), Justice Black said that this historically significant clause at least means that:

> "Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or dis-belief in any religion. No person can be punished for entertaining or professing beliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between Church and State.'" 330 U.S. at 15-16, 67 S. Ct. at 511-512. (Emphasis Added).

It can also be noted that the purpose of the Establishment Clause was to assure that a government would not "exert its power in the service of any purely religious end." *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 234, 83 S. Ct. 1560, 1577, 10 L. Ed. 2d 899 (1963) (Brennan, J., concurring).

A three-part test has emerged from this Court's cases involving the Establishment clause.[5] Under this now familiar test, the governmental law or regulation in question must (1) reflect a clearly secular legislative purpose; (2) have a primary effect that

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[5]In *Tilton* v. *Richardson,* 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971), Chief Justice Burger suggested an additional fourth test: does implementation of the Act inhibit the fee exercise of religion? While this suggested additional factor has not been picked up in subsequent decisions, see *Committee for Public Education and Religious Liberty* v. *Regan,* 444 U.S. 646, 653, 100 S. Ct. 840, 846, 63 L. Ed. 2d 94 (1980), Petitioners submit that Section III of their brief, *infra,* demonstrates that there has been no inhibition of free exercise of religion in this case.

neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion to pass muster under the Entanglement Clause. *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 773, 93 S. Ct. 2955, 2965, 37 L. Ed. 2d 948 (1973).[6] The District Court, in applying this test, considered a University policy that would permit *any* student group to meet in university-owned buildings for *any* purpose, regardless of religious affiliation. *Chess* v. *Widmar,* 480 F. Supp. 907, 914 (W.D. Mo. 1979). The Court, citing *Tilton* v. *Richardson* and *Schempp,* found that while this sort of regulation would have a clear secular purpose and would avoid entanglement with religion, a policy of permitting regular religious services in university-owned buildings would have the primary effect of advancing religion. *Chess, supra,* 480 F. Supp. at 941-916. Before proceeding with an analysis of whether such a use would have a "primary effect that advances religion", Petitioners would ask the Court to consider Petitioners' contention that to allow the Cornerstone group to use the University facilities in the manner sought would *also* lead to an impermissible "excessive government entanglement with religion" under the third factor of the three-pronged test. This Court has often expressed its concern about the potential for divisive political effect of a program of aid or assistance. *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 795-96, 93 S. Ct. 2955, 2977, 37 L. Ed. 2d 948 (1973) and *Meek* v. *Pettinger,* 421 U.S. 349, 374, 95 S. Ct. 1753, 1767, 44 L. Ed. 2d 217 (1975) (Brennan, J., concurring and dissenting). Petitioners submit that to allow the usage sought by the Respondent in this case would engulf Petitioners in such "political divisiveness." It is known from long experience that

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[6]Petitioners submit that the University regulations in question also comply with the analysis that has been suggested by Justice Brennan. *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664, 680, 90 S. Ct. 1409, 1417, 25 L. Ed. 2d 697 (1970) (Brennan, J., concurring).

> "...aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies." *Nyquist, supra,* 413 U.S. at 797, 93 S. Ct. at 2977.

Petitioners submit that if University facilities, built, maintained and operated by taxpayer monies, are permitted to be used for religious worship and religious teaching by recognized student groups, such action will undeniably lead to corrosive devisiveness and thereby activate a tarnishing of the brilliance of the Establishment Clause. Maintenance, construction and utility costs are ever-increasing and this in itself would require greater and greater expenditures of tax funds for religion. Secondly, these religious student groups would be put in competition with other student groups, both religious and non-religious, for continuing and greater usage of facilities. *Johnson* v. *Huntington Beach Union High School Dist.,* 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, 50-51 (1977), *cert. den.* 434 U.S. 877, 98 S. Ct. 228, 54 L. Ed. 2d 156 (1977).[7] Finally, it requires no prophet to perceive the eventual requests for support above and beyond the free usage of space. *Board of Ed. of Cent. Sch. Dist. No. 1* v. *Allen,* 392 U.S. 236, 253, 88 S. cT. 1923, 1931, 20 L. Ed. 2d 1060 (1968) (Black, J., dissenting). Even "... the most solid freedom steadily gives way before continuing corrosive action." *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 29, 67 S. Ct. 504, 518, 88 L. Ed. 1148 (1947) (Rutledge, J., dissenting).

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[7]Petitioners believe a case such as *Johnson* is helpful to the Court, even though it deals with a high school group. Petitioners believe that these cases are authoritative and will make additional references to certain other such cases. As one court has said with regard to freedom of the press, "...the relevent principles and rules apply generally to both high schools and universities." *Scoville* v. *Board of Ed. of Joliet Tp. H.S. Dist. 204, Etc., Ill.,* 425 F.2d 10, 13, fn. 5 (7th Cir, 1970), *cert. den.* 400 U.S. 826, 91 S. Ct. 51, 27 L. Ed. 2d 55 (1970).

A. Allowing The Cornerstone Group To Hold Regular, Reoccurring Religious Worship Services Or To Hold Regular Reoccurring Religious Teaching Sessions On The Campus Of The University Of Missouri Would Advance Religion.

Returning to the question of whether use of University facilities "advances religion," Petitioners submit that the determination made by Judge Collinson as to the improper advancement of religion is the correct one under the law.

The "primary effect" test forbids any governmental action that has a substantial religious impact and Petitioners believe such a *substantial religious impact* is present in this case. Petitioners maintain that Respondents are actually asking the University to lend its support to Cornerstone's efforts to "gain and keep adherents." This is an improper arrangement under the Establishment Clause. *School District of Abington Tp, Pa.* v. *Schempp*, 374 U.S. 203, 228, 83 S. Ct. 1560, 1574, 10 L. Ed. 2d 844 (1963) (Douglas, J., concurring). There can be no question but that religion and/or the religious purposes of the Cornerstone group and the student members thereof would be greatly benefited in this case.

1. To allow such meetings would provide the aura of implied approval by the University of Missouri and thereby the implied approval of the State of Missouri.

The first impermissible advancement is the implicit imposition of the state's imprimatur on the activities of the Respondents and their group. Petitioners argue that this is admitted by the affidavits submitted in support of Respondents' position. The affidavit of one of the students, Frederick Florian Chess, provides ample support for this contention of Petitioners. Mr. Chess swears in his affidavit (J.A. 18-19) that:

> "... it is difficult to interest other students in any activities which are off campus. *Students know that if something is on campus, then it is a student organization, and they are*

> *more likely to feel comfortable attending a meeting.* (Emphasis Added).

and,

> "... students who are not familiar with where we are meeting are not as likely to go to an unfamiliar address...as they would be to go to a regularly used and well-known campus building."

and,

> "Another disadvantage is that it makes our message and our purposes seem less remote and less relevant to the typical student. *Having to explain that we have to meet off campus tends to make students think that there is something 'wrong' with us and that there is something wrong with religion* since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group." (Emphasis Added).

This indicates to Petitioners that Respondents wish or desire the approval of the University to help them "effectively" spread their message to those "uncommitted" students they seek to bring into their group. Petitioners further contend that these quotations also indicate dramatically the import of the "symbolic" approval by the University of Respondents' efforts. See *Fox* v.*City of Los Angeles,* 150 Cal. Rptr. 867, 587 P.2d 663, 673 (In Bank 1978). Is this not a case where the Cornerstone group is seeking to use the facilities of the state university to gather those who are otherwise "...presumably too unenthusiastic to go unless moved to do so...." without this implied support? *Zorach* v. *Clauson,* 343 U.S. 306, 318, 72 S. CT. 679, 686, 96 L. Ed. 954 (1952) (Black, J., dissenting). Petitioners submit that the statements of Mr. Chess clearly indicate that the students seek to utilize "'...the prestige, power and influence'

of a public institution to bring religion into the lives of citizens." *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664, 696, 90 S. Ct. 1409, 1425, 25 L. Ed. 2d 697 (1970) (Harlan, J., concurring). Petitioners would submit that the "official support" implied by Cornerstone's usage of University facilities would be equal to or greater than the posting of the Ten Commandments found to be impermissible by this Court in *Stone* v. *Graham,* ____ *U.S.* ____, *101 S. Ct. 192, 194, 66 L. Ed. 2d 199 (1980). See also Ring* v. *Grand Forks Public School District No. 1,* 483 F. Supp. 272 (N.D. 1980) where a similar statute, applicable also to the president of every institution of higher education in the state, was held to be in violation of the establishment clause.

According to Cornerstone, meeting on the campus makes students feel comfortable attending a meeting; it makes it more likely that students will come to meetings; it will encourage students to return to meetings; it will make students feel that there is nothing wrong with religion; that religion has something to do with the realities of life; and it would allow greater attendance at Cornerstone meetings. Can it sincerely be said that these factors will not aid and abet the purpose of Cornerstone to "encourage one another in the faith and to grow in the grace and knowledge of the Lord Jesus Christ" (J.A. 17) and to attract the uninvolved so that they too might assure themselves that the "answers to life's unltimate questions rest with Jesus Christ and the Bible" (J.A. 18)? See *Johnson* v. *Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 16, 137 Cal. Rptr. 43, 51 (1977).

2. To allow such meetings would provide financial assistance to the religious purpose of Cornerstone.

Secondly, and equally important is the problem of the extension of financial aid (financial aid that comes from taxpayers) which would undeniably be extended to Respondents. See *McGowan* v. *State of Maryland,* 366 U.S. 420, 452-453, 81 S. Ct. 1101, 1119, 6 L. Ed. 2d 393 (1961) where the Court in-

timated that the use of "tax-supported buildings" was an aid to religion as much as the use of "tax monies," and see *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 774-75, 93 S. Ct. 2955, 2966, 37 L. Ed. 2d 948 (1973) where this Court recognized that expenditures for maintenance and repair, renovation, and for the cost of heating and lighting classrooms of sectarian schools had a primary effect of advancing religion. See also *Trietley* v. *Board of Education of City of Buffalo,* 65 A.D.2d 1, 409 N.Y.S.2d 912, 916 (1978). The Eighth Circuit determined that there *would* be financial support to Respondents. *Chess* v. *Widmar,* 635 F.2d 1310, 1317 (8th Cir. 1980). However, the Court attempted to avoid this crucial finding by characterizing the financial support as "minimal." It is quite clear under this Court's decisions that even "three pence" tax is too much. See Justice Douglas' dissent in *Tilton* v. *Richardson,* 403 U.S. 672, 693 91 S. Ct. 2091, 2102-2103 29 L. Ed. 2d 790 (1971). See also *Hall* v. *Bradshaw,* 630 F. 2d 1018 (4th Cir. 1980) where the Court said at page 1021:

> "... the limited nature of the encroachment does not free the State from the limitations of the Establishment Clause."

To allow or require *any* taxpayer support would certainly appear to run afoul of Madison's remonstrance that "... no person, either believer or non-believer, should be taxed to support a religious institution of any kind...." *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 12, 67 S. Ct. 504, 510, 88 L. Ed. 1148 (1947). Of course, Petitioners have spoken heretofore in terms of taxes paid by the citizens of the State of Missouri. However, cannot the student's activity fee (J.A. 26) also be viewed as a "tax"? Students pay this fee, a part of which goes to maintain the student union and other campus physical facilities. (J.A. 37, 40-41). To allow the usage sought by the students of Cornerstone must also be considered to infringe upon the rights of the campus "taxpayers."

> "...when taxpayers of many faiths [or no faith] are required to contribute money for the propagation of faith, the Free Exercise Clause is infringed." *Lemon* v. *Kurtzman,* 403 U.S. 602, 627-628, 91 S. Ct. 2105, 2118, 29 L. Ed. 2d 745 (1971). (Material added).

Petitioners would also submit that the University regulation in question stands up to the rigors of the three-pronged test under analysis from a different perspective. Let us examine the University regulation as it now stands (prohibiting religious worship) in light of the requirements of the test. First, a regulation that forbids usage of tax-supported state facilities for "religious worship" or "religious teachings" has a clear secular purpose. In fact, the regulation in question specifically provides that it "...is a policy required, in the opinion of the Board of Curators, by the Constitution and laws of the State...." (J.A. 29). Secondly, this policy does not advance or inhibit religion. The *beliefs* of Respondents are not in any way inhibited. Finally, this policy does not lead to an impermissible entanglement. Petitioners submit that they cannot assume "bad faith" upon the part of Respondents in regard to compliance with the regulations. *Lemon* v. *Kurtzman,* 403 U.S. 602, 618, 91 S. Ct. 2105, 2114, 29 L. Ed. 2d 745 (1971), *Committee for Public Ed., Etc.* v. *Regan,* 444 U.S. 646, 660-661, 100 S. Ct. 840, 850, 63 L. Ed. 2d 94 (1980). Respondents have, in fact, been quite candid and very specific as to the intent, motivation and purpose of their group. If this Court does find an impermissible establishment in permitting such usage of University facilities, Petitioner would expect no attempt at surreptitious worship by Respondents.

Healy v. *James,* 408 U.S. 169, 92 S. CT. 2338, 33 L. Ed. 2d 266 (1972) indicates that it would be perfectly permissible to require Respondents to agree to abide by University regulations prior to their usage of the facilities. All that would be required to monitor utilization would be continued use of the request form. Use of such a form, and its enforcement, would require

no greater entanglement than that previously permitted by this Court.In *Tilton,* the Court referred to "inspection" as being a "minimal contact" and explained that:

> "Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that states impose over all private schools within the reach of compulsory education laws." *Tilton* v. *Richardson,* 403 U.S. 672, 687, 91 S. Ct. 2091, 2100, 29 L. Ed. 2d 790 (1971). *Roemer* v. *Board of Public Works of Maryland,* 426 U.S. 736, 764, 96 S. Ct. 2337, 2353, 49 L. Ed. 2d 179 (1976).

B. A Considered Review Of Prior Decisions Of This Court And Other Jurisdictions Provide No Support To Justify The Aid And Assistance Sought By Respondents.

In *Tilton* v. *Richardson,* 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971), a case from the college or university setting where the question of assistance to religion was involved, and a case upon which Judge Collinson relied heavily, this Court aproved federal construction grants ". . . for buildings and facilities used exclusively for secular education purposes." However, the Court made it clear that:

> "The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans *only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship." Tilton* v. *Richardson, supra,* 403 U.S. at 679-680, 91 S. Ct. at 2096. (Emphasis Supplied).

and,

> "The institutions presented evidence that there had been no religious services or worship in the federally financed facilities. . ." *Tilton* v. *Richardson, supra,* 403 U.S. at 680, 91 S. Ct. at 2096.

Furthermore, the Court struck down a clause in the legislation which removed any restrictions on use after twenty years had expired. In writing the majority opinion, Chief Justice Burger held that such assistance in providing funds to build "buildings or facilities" for use of religion trespassed on the Religion Clause:

> "*If,* at the end of 20 years, *the building is,* for example, converted into a chapel or otherwise used *to promote religious interests,* the original federal grants will in part have the effect of advancing religion." *Tilton, supra,* 430 U.S. at 683, 93 S. Ct. at 2098. (Emphasis Added).

The Eighth Circuit attempted to distinguish *Tilton,* but could not effectively do so. In the recently decided case of *Dittman* v. *Western Washington University,* ____F. Supp.____ (W.D. Wa. 1980), app. dock. 9th Cir., the United States District Court for the Western District of Washington was faced with an almost identical situation as that before Judge Collinson. The Court in *Dittman* found:

> "The Court finds in the present case that the regular use of the University's classrooms and auditoriums for religious purposes would constitute an advancement of religion by the state. Moreover, the regular use of state facilities for religious purposes would have the unavoidable effect of placing the imprimatur of government upon the religious activities being conducted in those facilities.****
>
> "The Court concludes that it would be a violation of the Establishment Clause of the United Stated Constitution for the University to make its facilities available on a regular basis to religious groups for religious purposes." *Dittman, supra,* Slip Opinion, page 5.

In *Pratt* v. *Arizona Board of Regents,* 110 Ariz. 466, 520 P.2d 514 (Banc 1974), the Court dealt with requests for the usage of the football stadium on the campus of Arizona State University for religious services. While approving a rental to the Billy

Graham organization and holding that the leasing of Sun Devil Stadium for such "occasional religious services" at "fair rental value" was merely a straight commercial transaction, the Arizona Supreme Court, sitting en banc, made it very clear that anything not within these limited circumstances would not be upheld. The Court said at page 517:

> "The lease to a religious group, on a permanent basis, of property on the University campus, for example, would be an entirely different matter because by the permanency of the arrangement, the prestige of the State would be placed behind a particular religion or religion generally. Also, the lease of campus facilities for occasional use, but not for fair rental value, would violate the provision of our Constitution as being an appropriation or application of State property for religious purposes." See also *Resnick* v. *East Brunswick Tp. Bd. of Education,* 135 N.J. Super. 257, 343 A.2d 127, (1975), aff'd., 77 N.J. 88 389 A.2d 944 (1978).

Petitioners submit that Respondents actually have only one authority, from a University setting upon which to rely in support of their position. That case is, of course, *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975), cert. den. 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976). Unfortunately, the decision in *Keegan,* with all due respect to the Supreme Court of Delaware and Respondents, is a flawed one.[*] This was adequately pointed out by Judge Collinson in his opinion, *Chess* v. *Widmar, supra,* 480 F. Supp. at 916-917, Slip O., pp. 14-17. The *Keegan* case was also dismissed by Judge Vorhess in *Dittman* v. *Western Washington University,* Case No. C79-1189V, by saying that Keegan "seems to give insufficient weight to the Establishment Clause." *Dittman, supra,* Slip Opinion at page 5.

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[*] University submits that *Keegan* v. *University of Delaware* is not supported by Supreme Court precedent. In addition, there are other distinguishing factors about the case: (1) There is no reference to any organized student group being involved; (2) the case dealt with an area in the students' living quarters; (3) there is no indication that the services were intended to be open to the public; and (4) the Constitution of the State of Delaware was apparently not a factor of importance.

The Supreme Court of Delaware made no analyses of the individual prongs of the three-part test enunciated in *Lemon* v. *Kurtzman, supra.* The bald unsupported statement is made that abolishing the University policy as to religion would not run afoul of the prescribed tests. Additionally, and as pointed out by Judge Collinson, the authorities cited by the Delaware Court do not support the propositions for which they are cited. In fact, if *Zorach* v. *Clauson,* 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), means anything, when read in conjunction with *People of State of Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 648 (1948), it is that religious services cannot be held in tax-supported facilities. See *Zorach, supra,* 343 U.S. at 308-309, 72 S. Ct. at 681.

C. The Respondents Seek More Than Permissible Accommodation.

While not preventing or discouraging *reasonable* accommodation of religion, the First Amendment, as interpreted by the Supreme Court, requires a position of "neutrality." Petitioners submit they have shown neutral accommodation in recognizing Cornerstone and other such student groups (there are nine other recognized student groups on the campus that have religious or quasi-religious orientations) and in permitting equal access to University facilities as long as religious worship or teaching are not involved. However, it does not make the state unneutral to withhold what the Constitution forbids it to give. *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 59, 67 S. Ct. 504, 532, 88 L. Ed. 1148 (1947) (Rutledge, J., dissenting). Of course, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility. *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 246, 83 S. Ct. 1560, 1584, 10 L. Ed. 2d 844 (1963). In *Engel* v. *Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) this Court said:

> "It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong." *Engel, supra,* 370 U.S. at 433-434, 82 S. Ct. at 1268.

Petitioners submit that to permit the activities sought by Respondents in this case would be beyond reasonable accommodation and would trample any idea of neutrality! *Brandon* v. *Board of Ed. of Guilderland,* 487 F. Supp. 1219, 1226-1229 (N.D.N.Y. 1980) aff'd. 635 F.2d 971 (2d Cir. 1980).

"Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among these religion-education precedents, two general categories of cases may be identified; those dealing with religious activities within the public schools, and those involving public aid in varying forms to sectarian educational institutions." *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 772, 93 S. Ct. 2955, 2965, 37 L. Ed. 2d 948 (1973). While those in the latter category are sometimes approved, those in the former are almost never. *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 82 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); *Engel* v. *Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962).[9] It is clear that the assistance sought in this case must be classified in this disfavored category.

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[9] Petitioners would refer the Court mo pages 12-14 of their Brief filed with the Eighth Circuit where a comprehensive spectrum of cases prohibiting various religious activities *in* public schools is provided.

II. NEITHER THE FREE EXERCISE PROVISION OF THE RELIGION CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION NOR THE FREEDOM OF SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TAKE PRECEDENCE OVER THE ESTABLISHMENT PROVISION OF THE RELIGION CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners are greatly concerned about the Eighth Circuit's usage of the phraseology "religious speech" in this case. *Chess* v. *Widmar,* 635 F.2d 1310, 1315 (8th Cir. 1980). Is the Eighth Circuit purporting to use a "Super-Freedom" which melds and encompasses the protections granted to religion, intended to insure the freedom and independence of religion and religious groups, with the privileges extended to speech by our forefathers? Petitioners submit that the appellate Court was actually attempting to construct and use a "fiberglass pole" with which to ease and assist its efforts to spring over the Establishment wall. Petitioners question the use of a semantical artifice such as this to justify a constitutional infringement of this magnitude.

The First Amendment speaks in terms of "religion" and "speech". There is no mention whatsoever of a separate protection for "religious speech." Petitioners contend that something is either within the reference of the "religion clause" or within the reference of the "freedom of speech clause." Petitioners would not deny that you can have speech on religious topics or speech on or about religions, *Kunz* v. *People of State of New York,* 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 267 (1951), but would respectfully suggest that there is no support for any idea that such speech is any different than speech about politics; about tax reform; about abortion; about civil rights; or about capital punishment. It is still "speech" and such speech should not be given any greater protection because it happens to be

about a religious subject. Chief Justice Warren, writing for the Court in *U.S.* v. *O'Brien,* 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) said

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien, supra,* 391 U.S. at 376, 88 S. Ct. at 1678.

To so hold would in effect create a "Super-Freedom" which would in turn make the Establishment provision, so carefully expressed and nurtured by our founding fathers as an coguarantor in the protection of religious liberty, effectively meaningless. Petitioners would further suggest, that in the case at hand, the activities sought by the Respondents in this case go far beyond the realm of speech, symbolic or otherwise. The activities which take place at and encompass a Cornerstone meeting are integral parts of religion. They are part and parcel of religious worship. See *Collins* v. *Chandler Unified School District,* 470 F. Supp. 959, 963 (D. Ariz. 1979). This is so in the common understanding of any observer, and the understanding under the law, as set forth earlier in Petitioners' brief. This case is dictated by the *religion clause* of the First Amendment . . . not the freedom of speech clause.[10]

A. The Establishment Provision Was Not Intended To Be Of Secondary Importance To The Free Exercise Provision.

Petitioners think it important that the Court notice that they refer to the "religion clause." Not the "free exercise clause." Not the "establishment clause." This is based upon Petitioners'

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[10] Petitioners acknowledge that the Eighth Circuit also used a concept referred to as "the freedom to associate for the advancement of religious beliefs." While not specifically addressed, Petitioners ask the Court to consider its argument with regard to the freedom of speech clause to be equally applicable to the freedom of assembly clause.

argument that these two individual clauses make up a *combined* standard to protect the "freedom of religion." They are correlative and coextensive ideas, representing only different facets of a single great and fundamental freedom, *Everson* v. *Board of Education of Ewing Tp.*, 330 U.S. 1, 40, 67 S. Ct. 504, 523, 88 L. Ed. 1148 (1947) (Rutledge, J., dissenting), and they emerged from a common panorama of history. *Schempp, supra,* 374 U.S. at 232, 83 S. Ct. at 1577 (Brennan, J., concurring). They are mutual partners in the effort to keep church and state separate and thereby preserve the strength and integrity of both institutions.

> "These two proscriptions are to be read together, and *in light of the single end which they are designed to serve.* The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 305, 83 S. Ct. 1560, 1615, 10 L. Ed. 2d 84 (1963) (Goldberg, J., concurring). (Emphasis added).

While it can perhaps be argued that there is a "tension" between the two clauses, there is no support for the position that one or the other takes precedence.

> "'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are the other." *Everson* v. *Board of Education of Ewing Tp.*, 330 U.S. 1, 32, 67 S. Ct. 504, 519, 88 L. Ed. 1148 (1947) (Rutledge, J., dissenting).

The two provisions were intended to forbid two quite different kinds of governmental encroachment upon religious freedom. *Engel* v. *Vitale,* 370 U.S. 421, 430, 82 S. Ct. 1261, 1267, 8 L. Ed. 2d 601 (1962), *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 217-218, 83 S. Ct. 1560, 1569, 10 L. Ed. 2d 844 (1963). Nor is there any basis for the argument that the purpose of the establishment provision was only to insure protection for the "free exercise of religion." *McGowan* v. *State of Maryland,* 366 U.S. 420, 430, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). See also *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 15, 67 S. Ct. 504, 511, 88 L. Ed. 1148 (1947) (Black, J., dissenting).

In considering the Respondents' argument that the Supreme Court had relegated the establishment provision to a position inferior to that of the free exercise provision, the lower Court found such a position to be "without merit." *Chess* v. *Widmar,* 480 F. Supp. 907, 917 (W.D. Mo. 1979).

B. The Religion Clause And The Freedom Of Speech Clause Relate To Two Separate Evils And Thus One Cannot Be Said To Take Precedence Over The Other.

While Petitioners would concede that the draftsmen of our national Constitution perhaps indicated a preference for freedom of speech,[11] assembly, press and right to petition government, Petitioners would strongly argue that there is no support for the position that the freedom of speech clause was intended to be used as an escape device from the two "religion clauses", either together or individually. See *Williams* v. *Eaton,* 330 F. Supp. 107 (D. Wyo. 1971), aff'd. 468 F.2d 1079 (10th

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[11] It is nevertheless well understood that even the right of free speech is not absolute at all times and under all circumstances. *Chaplinsky* v. *State of New Hampshire,* 315 U.S. 568, 571, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942). See also *Tinker* v. *Des Moines Ind. School Dist.,* 393 U.S. 503, 522, 89 S. Ct. 733, 744, 21 L. Ed. 2d 731 (1969).

Cir. 1972) where the Court held that plaintiffs could not, under the guise of freedom of speech, hold a protest-demonstration against beliefs of the Mormon Church, on University property, because such activity would have been a violation of First Amendment's establishment provision (*and* the Wyoming constitution). As stated by Justice Stewart:

> ". . . acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired." *McDaniel* v. *Paty,* 435 U.S. 618, 98 S. Ct. 1322, 1377 at asterisk, 55 L. Ed. 2d 593 (1978) (Stewart, J., concurring).

The speech clause and the two provisions of the religion clause of the First Amendment are intended to control different areas. The religion clause is undeniably distinct. As Justice Jackson noted in his dissent in *Everson* v. *Board of Education of Ewing Tp.,* 330 U.S. 1, 67 S. Ct. 504, 88 L. Ed. 1148 (1947):

> ". . . the effect of the religious freedom Amendment to our Constitution was to take *every form* of *propagation of religion* out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayer's expense. *That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation,* a difference which goes to the very root of religious freedom. . . ." *Everson, supra,* 330 U.S. at 27, 67, S. Ct. at 516. (Emphasis added). See also *Lemon* v. *Kurtzman,* 403 U.S. 602, 633, 91 S. Ct. 2105, 2121, 29 L. Ed. 2d 745 (1971).

We must assume that the draftsmen of the Constitution intended what they wrote, An interpretation that "speech" or "assembly" took precedence would allow religious groups to go anywhere and say "we are here to speak" or "we are here to assemble" and thereby defeat the religion clauses, particularly the establishment provision, and all they stand for. As stated by

this Court in *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 795, 93 S. Ct. 2955, 2977, 37 L. Ed. 2d 948 (1973),

> ". . . the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State. . .have been regarded from the beginning as among the most cherished features of our constitutional system."

Of course, in so doing, religious groups, including Cornerstone, would be heading down the primrose path of denying themselves the independence of religious worship and liberty they have enjoyed in this country for over 200 years. Such an interpretation of the Constitution should not be lightly considered. It will suffice to say:

> "That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 1193, 87 L. Ed. 1628 (1943) (Frankfurter, J., dissenting).

III. ALTHOUGH THERE HAS BEEN NO INFRINGEMENT OF FREE EXERCISE RIGHTS IN THIS CASE, THE INTEREST OF THE STATE OF MISSOURI IN MAINTAINING A STRICT SEPARATION OF CHURCH AND STATE IS A COMPELLING STATE INTEREST OF THE HIGHEST ORDER WHICH WOULD JUSTIFY MINIMAL INFRINGEMENT.

For purposes of this section of their brief Petitioners would like to set forth again the pertinent excerpt from the First Amendment which is that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

Further broken down for purposes of this segment of the brief, the First Amendment says, in effect, "the State shall make no regulation prohibiting the free exercise of religion." Analysis of a free exercise claim involves a two-step process. It first must be determined whether or not governmental action creates a burden on the exercise of religion. If such an infringement on sincerely held beliefs is found, the action will be held violative of the free exercise provision unless there is a compelling state interest to override the protected interest. *Badoni* v. *Higginson,* 638 F.2d 172, 176-177 (10th Cir. 1980).

A. Respondents Can Show No Inference With Their Rights Of Free Exercise Of Religion.

Petitioners submit that they have not implemented a regulation prohibiting the free exercise of religion and Petitioners further submit that the Respondents' right to the free exercise of religion has not been prohibited. The trial court so found and its finding of fact should not be disregarded by this Court. *Meek* v. *Pittenger,* 421 U.S. 349, 392, 95 S. Ct. 1753, 1776, 44 L. Ed. 2d 217 (1975) (Brennan, J., concurring and dissenting). In fact, Judge Collinson specifically found that:

> "The facts before this Court simply to [sic] not establish that the 'practice' of holding religious services in a university-owned building is a matter of deep religious conviction to these plaintiffs." *Chess* v. *Widmar,* 480 F. Supp. 907, 917 (W.D. Mo. 1979).[12]

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[12] This is a factor which provides an additional manner of distinguishing this case from the recent decisions dealing with the Hare Krishna sect and the earlier cases which dealt with their historical

Petitioners have not prohibited Respondents from exercising their religion. The only thing that is contended by Respondents is that the University regulation in question merely makes their religious pursuits a little more "confused," a little less "comfortable" and a little less "convenient." (J.A. 18-19). Respondents and the other students appear to make no complaints whatsoever as to *interference* with their *beliefs*. This surely cannot be found to be equivalent to the "coercive effect" stated to be necessary in *Board of Ed. of Cent. Sch. District No. 1* v. *Allen*, 392 U.S. 236, 248-249, 88 S. Ct. 1923, 1929, 20 L. Ed. 2d 1060 (1968) and found in *Sherbert* v. *Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Petitioners have merely prohibited Respondents from exercising their religion on the campus of an institution of higher education, which is a constitutionally governed public corporation of the State of Missouri,[13] established, operated, maintained and funded by the tax dollars of the citizens of the State of Missouri, and to a lesser extent, the taxpayers of the United States,[14] all in accordance with constitutional mandates of the Constitution of

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predecessors, the Jehovah Witnesses. "The Hare Krishna religion imposes on its members the duty to perform a religious ritual known as Sankirtan, which consists of disseminating and selling religious tracts and soliciting contributions in public places." *Intern. Soc. for Krishna Conscious.* v. *Engelhardt*, 425 F. Supp. 176, 178, fn. 2 (W.D.Mo. 1977). The house to house distribution of printed books and pamphlets was likewise considered to be a religious practice of the Jehovah's Witnesses required by their literal reading of the Scriptures. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943).

[13] Article IX, Section 9a, Missouri Constitution of 1945. Section 172.020 RSMo (1978).

[14] For the budgetary year 1979-80, The University of Missouri system had an operating budget of $363,609,381. Of that amount, approximately 47%, or $178,417,989, was funded from State appropriations and approximately 10%, or $37,287,026, was funded from Federal appropriations.

Missouri and the First Amendment requirements of the United States Constitution. This is not an infringement of free exercise rights. *Johnson* v. *Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 17-18, 137 Cal. Rptr. 43, 52-53 (1977), *Hunt* v. *Board of Education of County of Kanawha,* 321 F. Supp. 1263, 1266 (S.D.W.Va. 1971) and *Lynch* v. *Indiana State U. Bd. of Trustees,* 378 N.E.2d 900, 904 (Ct. App. Ind. 1978), *cert. den.* 441 U.S. 946, 99 S. Ct. 2166, 60 L. Ed. 2d 1048 (1979). This Court, while strongly preserving the right of freedom as to religious beliefs, has indicated on several occasions that actions alleged to further those beliefs can be limited. *Cantwell* v. *State of Connecticut,* 310 U.S. 296, 303-304, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940), *Cox* v. *New Hampshire,* 312 U.S. 569, 578, 61 S. Ct. 762, 767, 85 L. Ed. 1049 (1941).

In this regard, it is interesting to note the words chosen by the writers of the First Amendment to our national Constitution. They spoke in terms of not "prohibiting" the free exercise of religion. Webster's defines "prohibit" as follows:

> "...to forbid by authority or command...to prevent from doing or accomplishing something: effectively stop...to make impossible...." *Webster's Third New International Dictionary of the English Language Unabridged* (G. & C. Merriam Co. 1976) p. 1813.

However, in regard to speech, press, assembly and the petitioning of government, the authors thereof spoke in terms of "abridging." Webster's defines "abridge" as follows:

> "...to dimish by reducing...to shorten in duration...shorten or cut down in extent..." *Webster's Third New International Dictionary of the English Language Unabridged* (G. & C. Merriam Co. 1976) p. 6.

The Constitution prevents more than just the "prohibiting" of these freedoms, they cannot even be diminished or shortened. Petitioners submit, conversely, that the rights to exercise

religion (in contrast to the rights to maintain religious beliefs) may be abridged although they may not be prohibited. Otherwise, the choice of words in the First Amendment has no meaning. It is beyond argument that the writers of the Constitution could have said

> "...or abridging the freedom of speech, or of the press, or the free exercise of religion...."

However, they made a conscious choice not to do so! Petitioners respectfully contend that the Court cannot ignore this conscious and premeditated choice of wording.

B. Missouri's Constitutional Interest In Maintaing A Legal Separation Of Church And State Provides A Compelling State Interest Justifying Any Minimal Interference Of Free Exercise Right.

Even assuming, arguendo, that the Court were to believe, contrary to the holdings of the trial court, that meeting on the campus was an integral part of the beliefs of the Respondents[15] and/or that their free exercise rights had been interfered with in some manner, Petitioners submit that they have a compelling state interest which mandates and thereby justifies any such alleged interference. The Court has recognized the need to provide for and protect such a compelling state interst. *Wisconsin* v. *Yoder,* 406 U.S. 205, 214, 92 S. Ct. 1526, 1532, 32 L. Ed. 2d 15 (1972). In fact, Chief Justice Burger, in *McDaniel* v. *Paty,* 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978) said:

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[15] As pointed out by Judge Collinson, the stipulations of the parties support at most, "...a finding that plaintiffs *prefer* having their religious services in a university-owned building to having the services in a building or home off-campus." *Chess* v. *Widmar,* 480 F. Supp. 907, 917 (W.D.Mo. 1979). It is interesting that one court indicates one of the grounds for the Eighth Circuit's decision in *Chess* was the fact that students frequently "...are unable to hold prayer meetings off campus." *Brandon* v. *Board of Ed. of Guilderland Cent. Sch.,* 635 F.2d 971 (2d Cir. 1980). However, there was no such evidence at the trial. In fact, the stipulated facts clearly indicated that the students continued to meet "about a block and a half from the campus." (J.A. 18).

> "The absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the *scope* of that protection since to do so might leave government powerless to indicate compelling state interest." *McDaniel, supra,* 435 U.S. at 627, 98 S. Ct. at 1328, footnote 7.

Petitioners would respectfully submit that the Constitution of the State of Missouri and its strict language with regard to the separation of Church and State required the action taken by Petitioners and thus provides a compelling state interest to Petitioners which would override any possible limited infringement upon Respondents' free exercise rights.

Missouri's first constitution, ratified in 1820, contained the following language:

> "...that no man can be compelled to erect, *support* or attend any place of worship...." Article XIII, paragraph 4 of the Missouri Constitution of 1820. (Emphasis added).

The second Missouri Constitution, the Constitution of 1865, included the above language at Article 1, Section X, and added the following:

> "no preference can ever be given, by law, to any church, sect, or mode of worship...." Article 1, Section XI of the Missouri Constitution of 1865.

A new section was added to the 1865 Constitution by the amendment of November 8, 1870. It was to be Section 10, Article IX and provided:

> "Neither the general assembly nor any county, city, town, township, school district, or other municipal corporation, shall ever *make any appropriation, or pay from any public fund whatever, anything in aid of any creed, church or sectarian purpose*...nor shall any grant or donation of personal property or real estate ever be made by state, county, city, town, or such public corporations, for any creed, church, or sectarian purpose whatever. (Emphasis added).

The next Constitution of the State of Missouri, which was adopted by the people of the State on October 30, 1875, to be effective November 30, 1875, was the Constitution of 1875. Section 6, Article II provided that "...no person can be compelled to erect, support or attend any place or system of worship...." Section 7 of Article II was new and it provided:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion... and that no preference shall be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship." Article II, section 7 of the Missouri Constitution of 1875.

Section 11 of Article 12 of the 1875 Constitution was the same as the language added to the 1865 Constitution by the amendment of November 8, 1870, discussed above.

In a special election on February 27, 1945, the people of the State of Missouri adopted the Constitution of 1945 of the State of Missouri, to be effective on March 30, 1945. This is the present Constitution of the State. The 1945 Constitution adopted without change the provisions discussed above. Article II, Section 6 of the 1875 Constitution, which traces its heritage back to 1820, was adopted as Article I, Section 6 in the new Constitution. Article II, Section 7 of the 1875 Constitution was carried over to Article I, Section 7 of the 1945 Constitution. Finally, Article 12, Section 11 of the 1875 Constitution became Article IX, Section 8 of the 1945 document. Thus is traced the heritage of the Missouri constitutional provisions before the Court in the case at bar.

Missouri's strict constitutional requirement of the separation of church and state, as evidenced by the review above, has been reviewed, discussed and upheld on many occasions by the Missouri Supreme Court. That Court has been very careful to preserve and protect this intent of the citizens of Missouri. One

of the first cases in Missouri to discuss these constitutional provisions was *Harfst* v. *Hoegen,* 349 Mo. 808, 163 S.W.2d 609 (Banc 1942). In *Harfst,* the Missouri Supreme Court reviewed whether or not a local school board could bring a parish school into the publec school system. Citing Article II, Section 6 of the 1875 Constiution, the Court conceded that "...our Constitution goes even farther than those of some other states." *Harfst, supra,* 163 S.W. at 613.

In *Berghorn* v. *Reorganized School District No. 8,* 364 Mo. 121, 260 S.W.2d. 573 (Banc 1953), the Missouri Supreme Court found that public tax monies were being unconstitutionally expended to assist parochial schools. In *Paster* v. *Tussey,* 512 S.W.2d 97 (Mo. Banc. 1974), *cert. den.* 419 U.S. 1111, 95 S. Ct. 785, 42 L. Ed. 2d. 807 (1975), the Court, after indicating that it was bound to follow the "dictates of the Missouri Constitution as now written," found a statute which authorized the lending of school textbooks to pupils and teachers who attend or teach in nonpublic schools to be unconstitutional. The Court, after a review of prior cases, said:

> "From all of which, it becomes readily apparent that the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." *Paster, supra,* 512 S.W.2d. at 101-102.

The position of the Supreme Court of Missouri seems clear.[16] While the Eighth Circuit, in cryptically disposing with this por-

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[16] See *Dorton* v. *Hearn,* 67 Mo. 301 (1878), *McVey* v. *Hawkins,* 364 Mo. 44, 258 S.W.2d 927 (1953) and *Special District for Ed. & Tr. of Hand. Child* v. *Wheeler,* 408 S.W.2d 60 (Mo. Banc 1966). The office of the Attorney General of the State of Missouri has issued several opinions in which Petitioners deem pertinent and which may be of interest to the Court. See *Op. Atty. Gen. No. 313,* Curtis 11-21-68, *Op. Atty. Gen. No. 337,* Graham 10-6-69, *Op. Atty. Gen. No. 265,* Reed 10-30-69, *Op. Atty. Gen. No. 82,* Marshall 9-2-70.

tion of the Petitioners' argument by use of a footnote, did in effect, totally ignore Missouri's serious and important constitutional interests and the numerous court decisions cases interpreting those interest, *Chess* v. *Widmar,* 635 F.2d 1310, 1321 (8th Cir. 1980) (Judge Bright and McMillian, dissenting), Petitioners would submit that the decisions of the Missouri Supreme Court are extremely relevant to this Court with regard to the question now before it. *School District of Abington Tp., Pa.* v. *Schempp,* 374 U.S. 203, 274, 83 S. Ct. 1560, 1599, 10 L. Ed. 2d 844 (1963)(Brennan, J., concurring). Furthermore, Petitioners submit that the Court should not and cannot permit itself to entertain conjectures as to the wisdom or constitutional necessity of Missouri's interests in separation. *Waugh* v. *Board of Trustees of University of Mississippi,* 237 U.S. 589, 35 S. Ct. 720, 723, 59 L. Ed. 1131 (1915).

The federal judiciary have also had occasion to review and discuss Missouri's constitutional mandate of strict separation. In *Brusca* v. *State of Missouri ex rel. State Board of Education,* 332 F. Supp. 275 (E.D.Mo. 1971), aff'd. 405 U.S. 1050, 92 S. Ct. 1493, 31 L. Ed. 2d. 786 (1972), the federal district court was asked to consider the alleged invalidity of prohibiting the use of public funds to aid, directly or indirectly, religious or sectarian schools. The Trial Court recognized the will of the people of Missouri with regard to the use of state funds in and for religion or religious institutions and found the constitutional provisions valid as against the objections made by the plaintiffs.

In *Leutkemeyer* v. *Kaufman,* 364 F. Supp. 376 (W.D.Mo. 1973), aff'd. 419 U.S. 88, 95 S. Ct. 167, 42 L. Ed. 2d. 134 (1974), a case dealing with a challenge to Missouri statutes which provided transportation of public school pupils to and from school, but did not provide for similar transportation for pupils of church-related schools, the District Court not only recognized Missouri's stricter standard, but found it was an interest of a *compelling* nature. At page 386, the Trial Court said:

"We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, *is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional power,' within the standard enunciated in NAACP* v. *Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L.Ed.2d 405 (1963), and applied in *Sherbert.* That interest, in our judgment, satisifes any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States. *We likewise find and conclude that Missouri's interest in that subject is within Missouri's constitutional power and that such interest may properly be described as an 'interest in the highest order'* within the meaning of *Yoder* and within the meaning of all the other various descriptive terms set forth in United States v. O'Brien above quoted." (Emphasis added). See also *Epeldi* v. **Engelking,** 94 Idaho 390, 488 P.2d 860, 867 (1971), 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d (1972).

Petitioners would again contend that the freedom of exercise of religion is not absolute. Petitioners further submit that

"...there must be a 'balancing' and that the governmental interest may be paramount if it is 'compelling.' Sherbert v. Verner.... The elements of such a balancing test include, in addition to the importance of the governmental and religious interests, the degree of interference with the religious practice." *Linscott* v. *Millers Falls Company,* 440 F.2d 14, 17 (1st Cir. 1971), *cert. den.* 404 U.S. 872, 92 S. Ct. 77, 30 L. Ed. 2d 116 (1971). See also *LeReau* v. *MacDougall,* 473 F.2d 974, 979 (1st Cir. 1972), *cert. den.* 414 U.S. 878, 94 S. Ct. 49, 38 L. Ed. 2d 123 (1973).

In this case, the importance of the governmental interest has been undeniably established. Conversely, the interference with

Respondents religious practice, if any, can only be said to be minimal. The scales clearly tip in favor of upholding the Petitioners' regulation. See *Johnson* v. *Robinson*, 415 U.S. 361, 385-386, 94 S. Ct. 1160, 1175, 39 L. Ed. 2d 389 (1974), *Dittman* v. *Western Washington University*, ___ F. Supp. ___ (W.D.Wa. 1980), Slip Opinion, page 7.

IV. ALTHOUGH THE CAMPUS OF A TAX-SUPPORTED PUBLIC INSTITUTION OF HIGHER EDUCATION, INCLUDING THE BUILDINGS, SIDEWALKS AND GROUNDS THEREOF MAY BE A "PUBLIC FORUM" FOR SOME PURPOSES, THAT FACT DOES NOT REQUIRE THE TAX-SUPPORTED PUBLIC INSTITUTION OF HIGHER EDUCATION TO MAKE ITS FACILITIES AVAILABLE FOR THE REGULAR RELIGIOUS WORSHIP SERVICES OF OR FOR REGULAR RELIGIOUS TEACHING BY A RECOGNIZED STUDENT GROUP.

Judge Collinson determined that the only issue before him was the Petitioners' refusal to allow religious worship meetings in University buildings. *Chess* v. *Widmar*, 480 F. Supp. 907 (W.D.Mo. 1979). This determination is supported by the allegations of the complaint filed by the students (J.A. 47) and it was Petitioners' refusal to allow regular, religious worship meetings in the Haag Hall Annex[17] in January of 1977 that precipitated this litigation (J.A. 27). However, the Eighth Circuit considered the term "facilities" to be broad enough to include the "grounds" of the University. *Chess* v. *Widmar*, 635 F.2d 1310, 1318 (8th Cir. 1980). It was also stipulated by the parties that while Respondents did not make a formal request for use of a

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[17]Built in 1968, Haag Hall Annex houses 13 classrooms, 2 large lecture halls, a language lab and an astronomical observatory. The building also houses faculty and administrative offices. It is one of the largest and most heavily used classroom buildings at the University of Missouri-Kansas City.

University lawn or "open area" for their religious purposes in accord with regular University procedures, they were not, in fact, permitted to so use the lawn. (J.A. 27). However, Petitioners would contend that neither its buildings nor its lawn and open areas must be opened to regular religious worship or religious teaching by an organized student group. To allow such activities, would, in Petitioners' view, not serve to "...preserve...the traditional college environment and atmosphere conducive to effective education and learning." *American Future Systems* v. *State University,* 618 F.2d 252, 259 (3d Cir. 1980).

It is not a principle of constitutional law that "...whenever members of the public are permitted freely to visit a place owned or operated by the government, then that place becomes a 'public forum' for purposes of the First Amendment." *Greer* v. *Spock,* 424 U.S. 828, 836, 96 S. Ct. 1211, 1216, 47 L. Ed. 2d 505 (1976). As stated in *Wolin* v. *Port of New York Authority,* 393 F.2d 83 (2d Cir. 1968):

> "...where the issue involves the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further; does the character of the place, the pattern of usual activity, the nature of the essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views or issues of political and social significance. *Wolin, supra,* 392 F.2d at 89. See *Adderly* v. *Florida,* 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1967).

However, Petitioners submit that the inquiry in this case must seek a determination as to whether vel non the buildings and grounds of the University are "an appropriate place" for religious worship services or religious teaching as opposed to communication on "issues of political and social significance."

Of course, Petitioners would not dispute that certain constitutional guaranties of the United States Constitution are applicable to public colleges and universities. *Healy* v. *James,* 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972). Nor can Petitioners dispute that the campus of a public institution of higher education is built, maintained and operated with public dollars. In fact, this public support is basic to the establishment arguments made by Petitioners in Section I of this brief, *supra.* However, merely because the University is a "publicly funded place," it is not thereby transformed into an unlimited "public forum" where *all* manner of expression (as permitted on city streets and sidewalks, city plazas, or in a city park) must also be permitted. As stated in *Dunkel* v. *Elkins,* 325 F. Supp. 1235 (D.Md. 1971) at page 1243:

> "...it does not advance the analysis to suggest that because a University is owned by the public and ordinarily open to the public, decisions on what must be permitted in other places are automatically applicable for the University." Quoting Wright, The Constitution on the Campus, 22 *Vand.L.Rev.* 1027, 1040 (1969).

A. The Buildings And Grounds Of A Public University Are Not Readily Comparable To Areas Traditionally Considered To Be Public Forums.

Petitioners would submit to the Court that the campus of a public institution of higher education is dedicated to one special function: education. *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927, 933 (N.D.Ill. 1968), *Stacy* v. *Williams,* 306 F. Supp. 963, 969 (N.D.Miss. 1969). Petitioners would go one step further and contend that this dedication is for purposes of a *secular* education. This is an obvious conclusion under the *Wolin* criteria set forth above. The total character of the public university; the activities that take place there; the historical and statutory purpose of public universities; the needs, desires and wishes of those who go there, whether student (prospective, undergraduate, graduate or professional),

professor, administrator, staff or visitor (whether there for theatre, music, athletics, research, professional care, consultation or academic expertise) are all finely attuned to this *secular* education purpose. This considered commitment to one specific goal is not common to most areas considered public forums. Petitioners contend that the Court must remember this dedication to *secular* education and the activities which would normally be considered to be supportive of this dedication; because, in the final analysis, one of the Court's questions in this matter must be: is there a basis incompatibility between which is sought by Respondents and the primary activity of the University? *Grayned* v. *City of Rockford,* 408 U.S. 104, 116, 92 S. Ct. 2294, 2303, 33 L. Ed. 2d 222 (1972). *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302-303, 94 S. Ct. 2714, 2717, 41 L. Ed. 2d 770 (1974).

"College buildings are generally dedicated to classrooms, administrative offices, libraries, health centers, or dormitories. In all of these, order and study are expected." *Sword* v. *Fox,* 446 F.2d 1091, 1097 (4th Cir. 1971), *cert. den.* 404 U.S. 994, 92 S. Ct. 534, 30 L. Ed. 2d 547 (1971). This certainly is in contrast to a *train terminal* (where the people are there "...for the principal purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit***", *Wolin* v. *Port of New York Authority,* 392 F.2d 83, 89 (2d Cir. 1968), and the "...primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin, supra,* 392 F.2d at 90.); and *airport central terminal area* (which covers some 900 acres, is city-like in nature and which assists in accommodating approximately "22 million passengers" in one year, *Brashich* v. *Port Authority of New York,* 484 F. Supp. 697 (S.D.N.Y. 1979)); or *the National Mall* ("a public park that has regularly been made available to all major demonstrations presenting First Amendment values" covering such diverse gatherings as "Resurrection City, The Moratorium, The Farm Tractor Protest, etc." and is, as a matter of policy "openly available to the